**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 4410 OF 2006**

Ganpati Dnyanu Sapate. .. Petitioner.

vs.

Tukaram Dnyanu Sapate. .. Respondent.

Mr. H.M. Kulkarni for petitioner.

Mr. S.S. Redekar for respondent.

**CORAM : A.P. DESHPANDE, J.**

**DATE : 8th November, 2006.**

P.C.

. Rule. Rule made returnable forthwith. Taken up for hearing and heard finally by consent of parties.

2. The petitioner and the respondent are real brothers. According to the petitioner, the joint family property owned by the petitioner and the defendant came to be partitioned on 28.4.1989. The suit plot had fallen to the share of the respondent. The respondent agreed to sale the suit plot to the petitioner and an agreement of sale was executed on 27.3.2002. The suit plot was agreed to be sold for a consideration of Rs. 1,14,000/- which the

petitioner claims to have paid to the respondent. The possession of the suit plot has also been handed over to the petitioner. At a later point of time, the respondent sold a portion of the suit plot admeasuring 11 Aars to one Ashok Ganpati Patil and aggrieved thereby the present petitioner instituted a Special Civil Suit bearing No. 11 of 2005 for specific performance of contract, which suit is pending on the file of the trial Court.

3. The respondent herein filed Regular Civil Suit No. 8 of 2005 claiming perpetual injunction against the present petitioner as he was apprehending dispossession. In the said suit, an application for temporary injunction was also filed wherein an ex-parte ad-interim injunction was granted by the trial Court on 17.1.2005. After the petitioner put in his appearance and opposed the application for temporary injunction, the trial Court passed the final order on the temporary injunction application rejecting the same and proceeded to vacate the ex-parte ad-interim order granted earlier in favour of the present respondent. The present respondent preferred Misc. Civil Appeal No. 35 of 2005 which is pending on the file of the District Court. When the Misc. Civil Appeal touching the temporary injunction was pending before the District Court, strangely enough the respondent moved the trial Court, which had lost session over

the proceedings, seeking to amend the temporary injunction application which was already disposed of. By passing an order the trial Court has allowed the said application seeking amendment of the temporary injunction application when the Misc. Civil Appeal is pending on the file of the District Court. It is this order dated 7.3.2006 passed by the trial Court allowing the amendment to the temporary injunction application, which is challenged in the present writ petition.

4. The learned counsel for the petitioner has invited my attention to an order passed by this Court on 13.9.2006 which indicate that the petitioner had given up his challenge to the order passed by the trial Court allowing the application seeking amendment of the plaint and had restricted this petition to the extent it challenges the order passed by the trial Court allowing amendment to the temporary injunction application. The learned counsel for the petitioner in the first place submits that in the absence of provision in the Civil Procedure Code, an application for temporary injunction cannot be amended. Secondly he submits that as the trial Court had passed final order on the temporary injunction application and an appeal was carried against the same before the District Court which is still pending, the Court which could have considered an amendment application would be

the First Appellate Court and not the trial Court. I am not impressed by the first submission that there is no power in the Court to allow an amendment of the civil application. The said submission is totally devoid of any merit and is stated for the same being rejected. Turning to the other submission that the Civil Court did not have jurisdiction to grant an amendment to a temporary injunction application once it decides the temporary injunction application finally. True it is that a misc. civil appeal which is carried against an order of rejection of temporary injunction is pending on the file of the First Appellate Court and the trial Court has lost session of the same. It is really strange how come when the misc. civil appeal is pending on the file of the District Court the respondent chose to move the trial Court seeking amendment to the temporary injunction application. The same is neither proper nor legal. The trial Court has committed a patent illegality and has also committed a jurisdictional error in allowing amendment to the temporary injunction application after it had disposed of the temporary injunction application and the appeal is pending in the appellate court. In this view of the matter, the present petition deserves to be allowed to the extent of that part of the order which permits amendment o the temporary injunction application. The impugned order to the above extent is quashed

and set aside. It is made clear that it shall be open for the respondent to approach the Additional District Judge, Islampur who is seized of misc. civil appeal bearing no. 35 of 2005 by an appropriate application, if so advised.

5. Rule is made absolute in the above terms. Needless to mention that if such an application is made, the appellate court will decide the same in accordance with law.

**(A.P. Deshpande, J.)**